LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 2 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,
Petitioner,
v.
SPENCER FOUNTAIN,
Respondent:

EVA L. JACKSON,
Petitioner,
v.
JUNIUS I. JACKSON,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230
Counsel for Petitioners

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,
Petitioner,
v.
SPENCER FOUNTAIN,
Respondent;

EVA L. JACKSON,
Petitioner,
v.
JUNIUS I. JACKSON,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners and proposed *amici curiae* respectfully pray, pursuant to Rule 58(2), that this Court grant rehearing of its order of April 15, 1974, denying certiorari.

Intervening circumstances of substantial effect on the question of whether the Court should review the denial of

right to litigate complained of in the petition for certiorari include the filing on April 12, 1974, of a motion for leave to file brief *amici curiae*, and annexed *amici* brief, which filing occurred hours after the Court's April 12 certiorari conference in this case. Page 2 of said motion, and Appendix B, p. 13, thereof, show a large number of claimants adversely affected by the action of the Court below in ruling against petitioners.

Another substantial ground available to petitioners and *amici* although not previously expressly presented or stressed is the point litigated in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930).[1] There the Court denied certiorari, 280 U.S. 604, later reversed this order and granted certiorari, 280 U.S. 550, and then reversed and remanded, holding that the state supreme court had "denied to the plaintiff 'due process of law'—using that term in its *primary sense* of an opportunity to be heard . . ." 281 U.S. at 678. (Italics added.) The action of the court below, as pointed out at pp. 13-15 of the petition for certiorari, abruptly changed, and applied retrospectively to petitioners, a "consistent line of procedural decisions with the retroactive effect of denying" them hearings, i.e., by destroying the prior long-standing Virginia rule that the effect of overruling a common law precedent is retroactive,[2] and that a court may not ignore uncontradicted evidence.[3]

The "opportunity to be heard" which due process requires "must be granted at a meaningful time and *in a meaningful manner*." *Armstrong* v. *Manzo*, 380 U.S. 545,

---

[1] Cited at pp. 2, 6 and 13 of the petition for certiorari (and incorporated by reference in the brief of proposed *amici*, p. 8).

[2] *Saffel* v. *Orr*, 109 Va. 769, 774, 64 S.E. 1057, 1059 (1909), cited at p. 13 of the petition for certiorari.

[3] *Hodge* v. *American Family Life Assurance Co.*, 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972), p. 15 of petition, note 22.

552 (1965) (Italics added).[4] The fact that petitioners had a hearing in the state supreme court[5] availed them little, since as previously stated[6] the state supreme court ignored all the relevant evidence.

Other substantial grounds available to petitioners and *amici*, although not previously expressly presented, are:

1. That the decisions below decided substantial and unsettled federal constitutional questions in an erroneous or at least doubtful manner, i.e., contrary to the condemnation of arbitrary denial of procedural equal protection and due process, found in *Brinkerhoff-Faris, supra; Bouie* v. *Columbia*, 378 U.S. 347, 354 (1964); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Glona* v. *American Guarantee and Liability Ins. Co.*, 391 U.S. 73, 75 (1968); *Levy* v. *Louisiana*, 391 U.S., 73, 81 (1968), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972),[7] where the Court struck down state classifications which barred claims for personal injuries which, like those here, did not "bear some rational relationship to a legitimate state purpose."

2. Had the decision below, and the foreign cases cited below, been decisions of United States Courts of Appeals, review would follow almost automatically to resolve conflicts between circuits. Similarity of procedural equal pro-

---

[4] Recently cited in a separate opinion in *Arnett* v. *Kennedy*, ... U.S. ....., 42 L.W. 4513, 4534 (1974).

[5] Petitioner Fountain got *none* in the *trial* court; the voluminous evidence tendered on the immunity plea there, much of which is set out at pp. 3-28 of the Appendix below, heretofore filed with this Court, was ignored by the trial judge who mechanistically entered judgment solely because another judge of the same court had ruled similarly without evidence in another case. Fountain opening brief, pp. 1-2, 19-20.

[6] Petition for Certiorari, pp. 4, 5, 7, 15.

[7] Cited at pp. 6-7 of the petition for certiorari.

tection and due process rights, as a matter of *federal* constitutional law, should not vary from state to state, as now is the case because of the conflict between the Virginia decision below as compared to contrary results in New York, Kentucky, Texas, California, and to some extent, New Jersey and Minnesota.[8]

CONCLUSION

Petitioners and amici have been invidiously discriminated against in being denied the right to litigate given others similarly situated in Virginia and many of its sister states. For the reasons set forth above and in the petition for certiorari and brief of proposed *amici*, it is respectfully urged that rehearing be granted, the order of April 15, 1974, revoked, leave to file granted *amici*, and certiorari granted.

---

[8] Although the true state of the law in these jurisdictions was brought to the attention of the court below, as shown in petitioner Fountain's opening brief, pp. 5-6 and reply brief, pp. 6-7, copies of which were filed with this Court and which are referred to at pp. 10-12 of the petition for certiorari, the court below in its opinion (petition, Appendix A, pp. 19-20) inexplicably ignored *Eicher* v. *Jones*, 285 Minn. 409, 173 N.W. 427 (1970); *Barile* v. *Anderson*, 203 N.W.2d 366 (Minn. 1972), and *Felderhoff* v. *Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971). See also p. 11, note 13, of the petition for certiorari as to the apparently similar situation in New Hampshire and Wisconsin.

CERTIFICATE OF COUNSEL

It is certified that this motion is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2).

Respectfully submitted,

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230
Counsel for Petitioners

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae